

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
)
HAWAII ELECTRIC LIGHT COMPANY, INC.) DOCKET NO. 2017-0122
)
For Approval of a Power Purchase)
Agreement for Renewable Dispatchable)
Firm Energy and Capacity.)

ORDER NO. **38198**

SUSPENDING THE DOCKET

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)	
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HAWAII ELECTRIC LIGHT COMPANY, INC.)	DOCKET NO. 2017-0122
)	
For Approval of a Power Purchase)	ORDER NO. 38198
Agreement for Renewable Dispatchable)	
Firm Energy and Capacity.)	
_____)	

SUSPENDING THE DOCKET

By this Order,¹ the Public Utilities Commission ("Commission"), temporarily suspends this docket in light of the Notice of Appeal filed by Hu Honua on January 24, 2022. Further details about the suspension are provided below.

Pursuant to the procedural schedule, as established in Order No. 37852, and subsequently modified in Order No. 38104

¹The Parties to this docket are HAWAII ELECTRIC LIGHT COMPANY, INC. ("HELCO"), HU HONUA BIOENERGY, LLC ("Hu Honua") (collectively, HELCO and Hu Honua are referred to as "Applicants"), and the DIVISION OF CONSUMER ADVOCACY ("Consumer Advocate"). The Commission has also granted Participant status to LIFE OF THE LAND ("LOL") and TAWHIRI POWER, LLC ("Tawhiri"). See Order No. 34554, "Opening a Docket to Review and Adjudicate Hawaii Electric Light Company, Inc.'s Letter Request for Approval of Amended and Restated Power Purchase Agreement, Filed in Docket No. 2012-0212 on May 9, 2017," filed May 17, 2017 ("Order No. 34554"). By letter filed January 12, 2022, Hamakua Energy, LLC, notified the Commission that it was withdrawing from this proceeding.

and 38143,² the evidentiary hearing in this proceeding is scheduled to begin next Monday, January 31, 2022, and last through Thursday, February 3, 2022.

On January 24, 2022, Hu Honua filed a notice of appeal of the Commission's Order Nos. 38169 and 38183³ with the Hawaii Supreme Court, which was assigned the case number SCOT-22-0000024 by the Court. Included as part of Hu Honua's Civil Appeals Docketing Statement, was a statement from Hu Honua that it was requesting that the Court stay the evidentiary hearing.⁴

Given the unexpected filing of the appeal and the impending commencement of the evidentiary hearing, the Commission will temporarily suspend this proceeding, including the evidentiary hearing, pending further details regarding Hu Honua's appeal.

²See Order No. 37852, "Reopening the Docket," filed on June 30, 2021; Order No. 38104, "Granting with Modifications, the Division of Consumer Advocacy's Motion for Enlargement of Time Filed on December 3, 2021," filed on December 7, 2021; and Order No. 38143, "Modifying the Procedural Schedule," filed on December 22, 2021.

³Order No. 38169, "Denying Hu Honua Bioenergy, LLC's Motion to Continue Hearing," filed on January 6, 2022; and Order No. 38183, "Addressing Hu Honua Bioenergy, LLC's Motion Regarding Applicability of HRS Section 269-6," filed on January 13, 2022.

⁴SCOT-22-0000024, Civil Appeal Docketing Statement at 2. A copy of the Civil Appeal Docketing Statement is attached to this Order.

The Commission is issuing this Order now to mitigate any confusion and unnecessary expenditure of resources that may be caused by the close proximity of the filing of the appeal this week and the scheduled commencement of the evidentiary hearing next week. Further details regarding the nature and duration of the suspension may be provided by the Commission through subsequent order.

THE COMMISSION ORDERS:

This proceeding is suspended, unless otherwise modified or lifted by subsequent Commission order.

DONE at Honolulu, Hawaii JANUARY 26, 2022 .

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By James P. Griffin, Chair By Jennifer M. Potter, Commissioner
James P. Griffin, Chair Jennifer M. Potter, Commissioner

APPROVED AS TO FORM:

By Mark Kaetsu By Leodoloff R. Asuncion, Jr., Commissioner
Mark Kaetsu Leodoloff R. Asuncion, Jr., Commissioner
Commission Counsel

2017-0122.ljk

IN THE
PUBLIC UTILITIES COMMISSION
(Court or Agency From Which Appeal is Taken)

CIVIL APPEAL DOCKETING STATEMENT
(For Use By The Appellate Mediation Program)

PLEASE ATTACH ADDITIONAL PAGES IF NECESSARY.

THIS SPACE FOR OFFICE USE ONLY

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Supreme Court
SCOT-22-0000024
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TITLE HU HONUA BIOENERGY, LLC, Appellant, vs. PUBLIC UTILITIES COMMISSION, State of Hawaii, et al., Appellees.	Trial Court/Agency Docket Number: PUC Docket No. 2017-0122
	Is this a Cross-Appeal? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
	Has this matter previously been before the Hawai'i Appellate Courts? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No If yes, state when: 08/26/2017 Case Name: In re Application of Hawaii Electric Light Co. Inc. Docket Number: SCOT-17-0000630
CHECK AS MANY AS APPLICABLE	
TRIAL COURT/AGENCY DISPOSITION	
1. STAGE OF PROCEEDINGS	2. RELIEF
<input checked="" type="checkbox"/> Pre-Trial <input type="checkbox"/> During Trial <input type="checkbox"/> After Trial	<input type="checkbox"/> Damages: Amount Sought: \$ _____ Amount Granted: \$ _____ <input checked="" type="checkbox"/> Other (Specify) Agency's Reversible Error

DESCRIPTION OF NATURE OF ACTION AND RESULT IN THE TRIAL COURT OR AGENCY:

In proceedings before the Public Utilities Commission ("PUC"), Hu Honua Bioenergy, LLC ("Hu Honua") seeks approval of its Power Purchase Agreement ("PPA") with Hawaii Electric Light Company ("HELCO"). This Court has already reversed the PUC twice in prior appeals arising out of those proceedings. In its latest reversal, this Court remanded to the PUC with directions to hold an evidentiary hearing that complied with due process to give explicit consideration to the reduction of GHG emissions in determining whether to approve the PPA, and make the findings necessary for this Court to determine whether the Commission satisfied its obligations under HRS § 269-6(b). Following remand, the PUC issued Order Nos. 38169 and 38183, attached as Exhibits A and B, respectively, in which the PUC erroneously determined that it would not apply HRS § 269-6(b) as currently written, and that it would not grant a short continuance of further proceedings, as Hu Honua requested, despite substantial prejudice and constitutional injury to Hu Honua.

HRAP Form 6 (Rev. 09/11)

ANTICIPATED ISSUES PROPOSED TO BE RAISED ON APPEAL:

Did the PUC commit reversible error when it determined that

1. The legislature's amendment of HRS § 269-6(b) has no effect on how that statute should be interpreted or applied in the proceedings before it; and
2. Hu Honua failed to demonstrate requisite good cause for a continuance of the evidentiary hearing, following the PUC's belated and prejudicial modifications to the procedural schedule?

DOES THIS APPEAL INVOLVE ANY OF THE FOLLOWING:

- ☐ Likelihood of a motion to expedite the appeal.
- ☒ Likelihood of motions to stay appeal pending resolution of a related case. Identify case name, docket number, and court or agency:
PUC Docket No. 2017-0122
- ☒ Other procedural complexities. If so, please identify them:

The evidentiary hearing in Docket No. 2017-0122 is scheduled to begin January 31, 2022. Hu Honua seeks an order from this Court staying that hearing pending resolution of this appeal.

Appellants' Names: HU HONUA BIOENERGY, LLC

COUNSEL FOR APPELLANTS: NAME: Bruce D. Voss ADDRESS: Topa Financial Ctr., 700 Bishop St., Ste. 900 Honolulu, HI 96813 TELEPHONE (808) 523-9000 EMAIL: bvoss@legalthawaii.com	TRIAL COUNSEL FOR APPELLANT(S) (If different from appeal counsel) NAME: Dean T. Yamamoto ADDRESS: 1100 Alakea Street, Suite 3100 Honolulu, HI 96813 TELEPHONE (808) 540-4500 EMAIL: dyamamoto@ychawaii.com
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I CERTIFY THAT A COPY OF THIS CIVIL APPEAL DOCKETING STATEMENT WAS SERVED ON EACH PARTY/COUNSEL SHOWN ON THE ATTACHED SERVICE LIST.

/s/ Bruce D. Voss

Signature

01/24/2022

Date

REMEMBER TO ATTACH COPIES OF:

- (1) THE ORDER/JUDGMENT APPEALED FROM;
- (2) ANY WRITTEN OPINION OR FINDINGS OF FACT AND CONCLUSIONS OF LAW SUPPORTING THE ORDER/JUDGMENT; AND
- (3) PROOF OF SERVICE ON ALL OTHER PARTIES TO THE TRIAL COURT OR AGENCY PROCEEDINGS (WITH TELEPHONE NUMBERS AND EMAIL ADDRESSES)

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Firm Energy and Capacity.)	
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ORDER NO. **38169**

DENYING HU HONUA BIOENERGY, LLC'S MOTION TO CONTINUE HEARING

EXHIBIT A

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)	
)	
HAWAII ELECTRIC LIGHT COMPANY, INC.)	DOCKET NO. 2017-0122
)	
For Approval of a Power Purchase)	ORDER NO. 38169
Agreement for Renewable Dispatchable)	
Firm Energy and Capacity.)	
_____)	

DENYING HU HONUA BIOENERGY, LLC'S MOTION TO CONTINUE HEARING

By this Order,¹ the Public Utilities Commission ("Commission") denies Hu Honua's Motion to Continue Hearing, filed on January 3, 2022 ("Motion"). However, in so doing, the Commission clarifies that during the hearing, the scope of cross-examination for each witness will be reasonably limited to information in responses to information requests ("IRs") that a witness has sponsored and/or information in testimony that a

¹The Parties to this docket are HAWAII ELECTRIC LIGHT COMPANY, INC. ("HELCO"), HU HONUA BIOENERGY, LLC ("Hu Honua") (collectively, HELCO and Hu Honua are referred to as "Applicants"), and the DIVISION OF CONSUMER ADVOCACY ("Consumer Advocate"). The Commission has also granted Participant status to LIFE OF THE LAND ("LOL"), TAWHIRI POWER, LLC ("Tawhiri"), and HAMAKUA ENERGY, LLC ("Hamakua"). See Order No. 34554, "Opening a Docket to Review and Adjudicate Hawaii Electric Light Company, Inc.'s Letter Request for Approval of Amended and Restated Power Purchase Agreement, Filed in Docket No. 2012-0212 on May 9, 2017," filed May 17, 2017 ("Order No. 34554").

witness has submitted. Further, if requested, examiners will be required to provide the witness with the opportunity to locate any document used for questioning or provide a virtual copy of the particular document.

I.

BACKGROUND

On June 30, 2021, following the Hawaii Supreme Court's Judgment on Appeal for SCOT-20-0000569, which vacated the Commission's prior order dismissing HELCO's application for a waiver from the competitive bidding framework for the amended power purchase agreement ("PPA") between HELCO and Hu Honua, the Commission issued Order No. 37852, which reopened this docket and established a statement of issues and a procedural schedule.² Order No. 37852 tentatively scheduled the evidentiary hearing for this proceeding for the week of January 10, 2022.³

Throughout the summer and fall of 2021, discovery and the submission of testimony proceeded according to the schedule.

²Order No. 37852, "Reopening the Docket," filed on June 30, 2021 ("Order No. 37852").

³Order No. 37852 at 13 (the procedural schedule inadvertently refers to "the week of January 10, 2021"; however, it is clear from the context of the schedule that January 10, 2022 was intended).

On December 3, 2021, the Consumer Advocate submitted a motion seeking to modify the remaining procedural deadlines, including a slight move of the evidentiary hearing to the week of January 24, 2022.⁴ In addition, the Consumer Advocate also sought clarification as to whether the hearing would be held virtually or in-person.⁵

On December 6, 2021, Hu Honua filed its response to the Consumer Advocate's Motion.⁶ In its response, Hu Honua stated that it "has confirmed that all of its witnesses are available during the week of January 24, 2022, and, therefore, has no objection to the Consumer Advocate's Motion for Enlargement of Time."⁷

On December 7, 2021, the Commission issued Order No. 38104, which granted, with modifications, the Consumer Advocate's Motion.⁸ In so doing, the Commission

⁴"Division of Consumer Advocacy's Motion for Enlargement of Time," filed on December 3, 2021 ("Consumer Advocate Motion"), at 2 (the Consumer Advocate's motion refers to the week of "January 24, 2021," but, as with Order No. 37852, context indicates that "January 24, 2022" was intended).

⁵Consumer Advocate Motion at 4 n.3.

⁶"Hu Honua Bioenergy LLC's Memorandum in Response to Division of Consumer Advocacy's Motion for Enlargement of Time; and Certificate of Service," filed on December 6, 2021 ("Hu Honua Response to Consumer Advocate Motion").

⁷Hu Honua Response to Consumer Advocate Motion at 1.

⁸Order No. 38104, "Granting, with Modifications, the Division of Consumer Advocacy's Motion for Enlargement of Time Filed on December 3, 2021," filed on December 7, 2021 ("Order No. 38104").

modified the procedural schedule according to the Consumer Advocate's Motion, with the exception of the evidentiary hearing; due to a pre-existing conflict, the Commission moved the evidentiary hearing to the week of January 31, 2022, rather than the week of January 24, 2022, as requested by the Consumer Advocate.⁹

The Commission further clarified that the hearing would be held remotely, in light of the ongoing health and safety concerns arising from the COVID-19 pandemic.¹⁰ In addition, the Commission observed that utilizing a virtual format would help relieve some of the logistical considerations regarding witness travel during this time.¹¹ Lastly, the Commission stated that given that discovery had ended, it intended to proceed with the hearing and would not be inclined to consider further procedural modifications.¹²

No party moved to reconsider or clarify Order No. 38104.¹³

⁹See Order No. 38104 at 6-7.

¹⁰Order No. 38104 at 8.

¹¹Order No. 38104 at 9.

¹²Order No. 38104 at 9.

¹³See HAR § 16-601-137 (motion for reconsideration of a Commission order must be filed within ten days after the order is served on a party).

On December 21, 2021, the Parties and Participants, including Hu Honua, filed their Prehearing Statements of Position, consistent with the modified schedule established in Order No. 38104.

On December 23, 2021, the Commission issued its Notice of Evidentiary Hearing, which set the hearing for January 31 through February 3, 2022, consistent with Order No. 38104.

On December 28, 2021, the Parties and Participants, including Hu Honua, submitted their lists of witnesses, pursuant to the modified schedule in Order No. 38104.

On January 3, 2022, Hu Honua filed its Motion, seeking to indefinitely continue the evidentiary hearing until "a time when in-person hearings can safely be accomplished so that Hu Honua will be able to effectively present and defend its application for approval at the Hearing - for example, when the City and County of Honolulu is no longer in a state of emergency or disaster period (or when there are no restrictions to holding the Hearing in-person)." ¹⁴

¹⁴Motion at 7.

II.

DISCUSSION

The Commission is not persuaded that a continuation of the evidentiary hearing is justified at this time.

First, Hu Honua did not challenge or object to the procedural schedule modification in Order No. 38104. In response to the Consumer Advocate's Motion, Hu Honua voiced support for the schedule modification and clarified that its witnesses would be available on those dates (i.e., the week of January 24, 2022).¹⁵ Hu Honua did not comment on the Consumer Advocate's request for clarification as to whether the hearing would be held virtually or in-person, nor offer any preference on the matter.

Thereafter, the Commission modified the procedural schedule in Order No. 38104, in which it adopted all of the Consumer Advocate's requested deadlines, save moving the evidentiary hearing one week, from the week of January 24, 2022, to the week of January 31, 2022. Further, Order No. 38104 clarified that the evidentiary hearing would be held remotely via Webex, in light of health and safety concerns arising from the ongoing COVID-19 pandemic.

Hu Honua did not timely seek to reconsider or clarify the modified procedural schedule, including either the week of

¹⁵Hu Honua Response to CA Motion at 1.

the evidentiary hearing or the hearing's virtual nature. Rather, Hu Honua proceeded to comply with the modified prehearing deadlines.

Second, in its Motion, Hu Honua does not provide any explanation or justification for why it waited to raise these issues until January 3, 2022, after the relevant reconsideration deadlines had passed, and after having just represented to the Commission that its witnesses were all available the week of January 24, 2022. Rather, Hu Honua relies on two points: (1) the removal of the requirement for Parties and Participants to submit an exhibit list has impacted its witness preparations; and (2) the hearing must be held in-person to satisfy Hu Honua's due process rights. However, the Commission does not find either of these reasons compelling.

Regarding the exhibit list requirement, the Commission is not convinced that this has unreasonably burdened Hu Honua's witness preparation.¹⁶ While this docket has a lengthy history, this remanded proceeding is limited to the Statement of Issues established in Order No. 37852. Further, each Party has submitted a Witness List, identifying the pertinent IR responses and testimony related to each witness. This naturally limits the scope of relevant cross-examination for a particular witness, who should

¹⁶See Motion at 2-3.

already be familiar with the IR responses and testimony they have sponsored in this proceeding.

The intent of the removal of the exhibit list requirement was to recognize some of the practical opportunities afforded by a virtual hearing. Unlike an in-person hearing, where exhibits would have been physically transported by the Commission, Parties, and Participants and stored at the hearing venue, a virtual hearing allows for easier access to the docket record for both examiner and examinee. Thus, rather than requiring Parties and Participants to list all possible documents they may wish to "bring" to a virtual setting, the Commission recognized that as both examiner and examinee have equal access to the record via the Commission's electronic Document Management System, it would be more efficient to acknowledge the reality of the Parties' and Participant's ability to access the entire record.

This does not mean that the entire record may be utilized in a haphazard fashion. Questions must still fall within the scope of the Statement of Issues and be relevant to the subject matter expertise of each respective witness. In addition, when cross-examining a witness, if an examiner wishes to rely on a document from the record, it must provide a reasonable reference to that document and allow the witness an opportunity to

locate it;¹⁷ alternatively, the examiner may produce a virtual copy for the witness to reference.

Regarding utilizing a virtual hearing, Hu Honua has not justified how this is necessary to protect its due process rights. Hu Honua argues that due process requires an opportunity to be heard at a meaningful time in a meaningful manner, which includes an "opportunity to effectively present and defend on cross-examination"¹⁸ However, aside from referring to the lengthy nature of the record, Hu Honua does not proffer any credible reason why it cannot effectively present and defend on cross-examination in a virtual hearing.¹⁹ As discussed above, the virtual nature of the hearing is expected to facilitate easier access to the record, as electronic documents can be organized and stored in a much more efficient and accessible fashion than printed documents.

¹⁷See Order No. 38143, "Modifying the Procedural Schedule," filed on December 22, 2021, at 3.

¹⁸Motion at 6-7.

¹⁹C.f., Act 168 (S.B. 873), which took effect on October 1, 2021, and amends HRS § 91-9 to "authorize contested case hearings to be conducted through the use of interactive conference technology." "Interactive conference technology" is defined as "any form of audio or audio and visual conference technology, including teleconference, videoconference, and voice over internet protocol, that facilitates interaction between the agency, any party, and counsel if retained by the party." HRS § 91-9 (as amended).

Further, Hu Honua's asserted concerns regarding using screen-sharing technology are speculative. While technology may not be perfect, it offers a reasonable substitute under these unique situations, as evidenced by the widespread adoption of virtual hearings for legislative, judicial, and executive agency hearings during the pandemic, none of which has evidenced a loss of procedural due process due to the virtual format of the hearing.²⁰ The Commission itself has held a number of hearings virtually during the pandemic, including an evidentiary hearing for a power purchase agreement, similar to the Amended PPA.²¹ Weighed against Hu Honua's proffered alternative of indefinitely delaying the evidentiary hearing until it is safe to resume in-person gatherings (a situation which has been further cast into uncertainty in light of the rapid spread and transmissibility of the Omicron variant), the Commission believes that proceeding with

²⁰For example, the Supreme Court has regularly been holding its hearings virtually, including the oral argument which decided SCOT-20-0000569 that remanded this matter back to the Commission.

²¹See Docket No. 2020-0142, during which the Commission used Webex to virtually hold an evidentiary hearing from September 14-15, 2021, on Maui Electric Company, Limited's power purchase agreement with Kahana Solar, LLC (an exhibit list was not required for this hearing and did not produce issues with witness preparation or cross-examination). See also, Docket Nos. 2018-0088 and 2019-0117, both of which involved the Commission using Webex to host virtual hearings during the pandemic.

a virtual hearing is not only demonstrably reasonable under the circumstances, but also supported by statute.²²

Third, indefinitely delaying the hearing is not consistent with the public interest. Given the long history of this docket, it should be resolved without undue delay. The Court has given specific instructions to the Commission on remand and the Commission's schedule seeks to accomplish this in an organized, just, speedy, and inexpensive manner. Moreover, the uncertainty surrounding approval of the Amended PPA affects a broad range of interests, such as those of HELCO and its customers and other Parties and Participants in this docket, including Hu Honua. Indefinitely delaying resolution of this issue would only expose these interests to prolonged uncertainty. Comparatively, as discussed above, the Commission does not find Hu Honua's competing desire to hold an in-person hearing compelling enough to justify such prolonged uncertainty.

Fourth, Hu Honua's sudden request is inconsistent with the sense of urgency it has cultivated throughout this proceeding.²³ Hu Honua's Motion, inexplicably, seeks to

²²See HRS § 91-9 (as amended by Act 168).

²³See "Hu Honua Bioenergy, LLC's Prehearing Testimonies; Exhibits 'Hu Honua-100' - 'Hu Honua-800'; and Certificate of Service," filed on September 16, 2021, Hu Honua Testimony T-1 (Warren Lee) at page 6 of 33; and "Hu Honua Bioenergy, LLC's

indefinitely continue the evidentiary hearing, which would result in an open-ended delay of reviewing the Amended PPA. Given Hu Honua's prior representations about the status of the Project, it is incongruous that Hu Honua now seeks to indefinitely postpone this proceeding, which would expose Hu Honua to an extended period of uncertainty.

In sum, the Commission denies Hu Honua's Motion and affirms its prior statement that it is not inclined to consider further schedule modifications. That being said, the Commission clarifies that hearing participants will have a reasonable opportunity to familiarize themselves with Webex ahead of the hearing, and that the virtual nature of the hearing should not impede the ability to cross-examine any witness. Further details about the hearing will be discussed at the Prehearing Conference, scheduled for January 14, 2022.

Prehearing Statement of Position; Exhibits '1' - '4'; and Certificate of Service," filed on December 21, 2021, at 55.

III.

ORDERS

THE COMMISSION ORDERS:

Hu Honua's Motion to Continue Hearing is denied.

DONE at Honolulu, Hawaii JANUARY 6, 2022.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By James P. Griffin
James P. Griffin, Chair

By Jennifer M. Potter
Jennifer M. Potter, Commissioner

By Leodoloff R. Asuncion, Jr.
Leodoloff R. Asuncion, Jr., Commissioner

APPROVED AS TO FORM:

Mark Kaetsu
Mark Kaetsu
Commission Counsel

2017-0122.ljk

CERTIFICATE OF SERVICE

Pursuant to Order No. 37043, the foregoing Order was served on the date it was uploaded to the Public Utilities Commission's Document Management System and served through the Document Management System's electronic Distribution List.

FILED

2022 Jan 06 PM 13:00

PUBLIC UTILITIES
COMMISSION

The foregoing document was electronically filed with the State of Hawaii Public Utilities Commission's Document Management System (DMS).

OF THE STATE OF HAWAII

DOCKET NO. 2017-0122

38183

REGARDING APPLICABILITY OF HRS SECTION 269-6

EXHIBIT B

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
)
HAWAII ELECTRIC LIGHT COMPANY, INC.) DOCKET NO. 2017-0122
)
For Approval of a Power Purchase) ORDER NO. **38183**
Agreement for Renewable Dispatchable)
Firm Energy and Capacity.)
_____)

ADDRESSING HU HONUA BIOENERGY, LLC'S MOTION
REGARDING APPLICABILITY OF HRS SECTION 269-6

By this Order,¹ the Public Utilities Commission ("Commission"), addresses Hu Honua's Motion to Confirm that Hawaii Revised Statute Section 269-6(b), as Amended by Act 82, Applies to this Proceeding ("Motion"), filed on January 4, 2022,²

¹The Parties to this docket are HAWAII ELECTRIC LIGHT COMPANY, INC. ("HELCO"), HU HONUA BIOENERGY, LLC ("Hu Honua") (collectively, HELCO and Hu Honua are referred to as "Applicants"), and the DIVISION OF CONSUMER ADVOCACY ("Consumer Advocate"). The Commission has also granted Participant status to LIFE OF THE LAND ("LOL") and TAWHIRI POWER, LLC ("Tawhiri"). See Order No. 34554, "Opening a Docket to Review and Adjudicate Hawaii Electric Light Company, Inc.'s Letter Request for Approval of Amended and Restated Power Purchase Agreement, Filed in Docket No. 2012-0212 on May 9, 2017," filed May 17, 2017 ("Order No. 34554"). By letter filed January 12, 2022, Hamakua Energy, LLC, notified the Commission that it was withdrawing from this proceeding.

²"Hu Honua Bioenergy, LLC's Motion to Confirm that Hawaii Revised Statutes Section 269-6(b), as Amended by Act 82,

by clarifying that it intends to apply the version of HRS § 269-6(b) currently in effect (i.e., the amended version), but, as previously stated in Order Nos. 37852 and 37910, does not find that Act 82 materially changes the Commission's review of the Project under HRS § 269-6(b) or otherwise alter the applicability and holdings in HELCO I and HELCO II³ to this remanded proceeding.⁴

I.

BACKGROUND

On June 30, 2021, following the Hawaii Supreme Court's Judgment on Appeal for HELCO II, which vacated the Commission's prior order dismissing HELCO's application for a waiver from the

Applies to this Proceeding; Memorandum in Support of Motion; and Certificate of Service," filed January 4, 2022.

³HELCO I and HELCO II refer to the Hawaii Supreme Court decisions addressing prior appeals that have arisen from this docket. See Matter of Hawai'i Electric Light Company, Inc., 145 Hawaii 1, 445 P.3d 673 (2019) ("HELCO I"); and Matter of Hawai'i Electric Light Company, Inc., 149 Hawaii 239, 487 P.3d 708 (2021) ("HELCO II").

⁴See Order No. 37910, "(1) Denying Life of the Land's Motion for Reconsideration/Clarification of Order No. 37852 Filed July 12, 2021; (2) Denying Tawhiri Power LLC's Motion for Reconsideration of Order No. 37852, Filed on June 30, 2021, Filed July 12, 2021; (3) Denying Hu Honua Bioenergy, LLC's Motion for the Commission to Consider Act 82 and Address Its Impact on Order No. 37852 Reopening the Docket Filed July 20, 2021; (4) Partially Granting the Division of Consumer Advocacy's Motion for Leave to Respond Filed July 23, 2021; and (5) Dismissing All Other Related Procedural Motions," filed on August 11, 2021 ("Order No. 37910"), at 23-32.

competitive bidding framework for the amended power purchase agreement ("PPA") between HELCO and Hu Honua, the Commission issued Order No. 37852, which reopened this docket and established a statement of issues and a procedural schedule.⁵

In relevant part, Order No. 37852 established the following Statement of Issues:

1. What are the long-term environmental and public health costs of reliance on energy produced at the proposed facility?
 - a. What is the potential for increased air pollution due to GHG emissions directly attributed the Project, as well as from earlier stages in the production process?
2. What are the GHG emissions that would result from approving the Amended PPA?
3. Whether the cost of energy under the Amended PPA is reasonable in light of the potential for GHG emissions.
4. Whether the terms of the Amended PPA are prudent and in the public interest, in light of the Amended PPA's hidden and long-term consequences.⁶

In doing so, the Commission relied heavily on HELCO I, and the caselaw cited therein, and "focused on the consideration of GHG emissions as they related to the Amended PPA and the Project, as this was the focus of the Court's holding in HELCO I."⁷

⁵Order No. 37852, "Reopening the Docket," filed on June 30, 2021 ("Order No. 37852").

⁶Order No. 37852 at 7-8.

⁷Order No. 37852 at 8-10 (citation omitted).

On July 20, 2021, Hu Honua filed a motion requesting the Commission to “consider” Act 82 and “address its impact on the statement of issues set forth in Order No. 37852.”⁸ In particular, Hu Honua’s Act 82 Motion sought clarification regarding footnote 35 of Order No. 37852, which provided that “to the extent a Party or Participant believes that the amendments to HRS § 269-6 effectuated by Act 82 warrant consideration, this procedural schedule offers an opportunity to make this case.”⁹ More specifically, Order No. 37852 acknowledged that “HRS § 269-6(b) was amended by Act 82, which was signed by Governor Ige on June 24, 2021[,]” but “[f]or purposes of this docket, the Commission does not believe that these amendments alter the basis for the [Hawaii Supreme] Court’s interpretation of the Commission’s statutory obligations under HRS §269-6(b), as previously set forth in In re MECO, HELCO I, and HELCO II.”¹⁰

Hu Honua contended that the amendments to HRS § 269-6(b) effectuated by Act 82 “substantially narrow[ed] the type of GHG emissions that the Commission must consider pursuant to

⁸“Hu Honua Bioenergy, LLC’s Motion for the Commission to Consider Act 82 and Address Its Impact on Order No. 37852 Reopening the Docket; Memorandum in Support of Motion; and Certificate of Service,” filed July 20 2021 (“Hu Honua Act 82 Motion”).

⁹Hu Honua Act 82 Motion at 1; see also, Order No. 37852 at 19 n.35.

¹⁰Order No. 37852 at 9 n. 20.

HRS § 269-6(b) [,]" limiting it to GHG emissions associated solely with fossil fuels, rather than the entire Project (including GHG emissions associated with biomass, as was previously required under HELCO I.¹¹ As a result, Hu Honua requested that the Commission "fully consider and address the impact of Act 82 on each of the issues in the Statement of Issues set forth in the Commission's Order Reopening Docket . . . [and] [t]o the extent the Commission disagrees with Hu Honua's interpretation of the plain language of Act 82, . . . request[ed] an explanation of the Commission's basis and reasoning" ¹²

On August 11, 2021, the Commission issued Order No. 37910, which, in relevant part, denied Hu Honua's Act 82 Motion. In so doing, the Commission first observed that Hu Honua's Act 82 Motion was, in substance, an untimely motion for reconsideration of Order No. 37852.¹³

¹¹See Hu Honua Motion Act 82 Motion, Memorandum in Support at 1-2. C.f., HELCO I, 145 Hawaii at 23-24, 445 P.3d at 695-696 (holding that the Commission failed to comply with HRS § 269-6(b), in part, by "ma[king] no express findings or conclusions regarding the biomass facility's GHG emissions," and failing to address "the potential for increased air pollution as a result of GHG emissions' directly attributed to energy generation at the facility, as well as GHG emissions produced at earlier stages in the production process, such as fuel production and transportation.").

¹²Hu Honua Act 82 Motion, Memorandum in Support at 3-4.

¹³Order No. 37910 at 24-26.

Further, the Commission found that even if the merits of Hu Honua's Act 82 Motion were considered, they did not persuasively demonstrate legislative intent to exempt biomass projects (and their associated emissions) from the Commission's review under HRS § 269-6(b), nor did the grammatical changes to HRS § 269-6(b) clearly evidence an intent to materially alter the applicability and holdings of HELCO I and HELCO II to this remanded proceeding.¹⁴

On January 4, 2022, Hu Honua filed its Motion, in which Hu Honua again raises the amendments to HRS § 269-6(b) arising from Act 82, and seeks a finding by the Commission that HRS § 269-6(b), as amended by Act 82, "applies to this remand proceeding involving the Commission's approval of the [Amended PPA]." ¹⁵ Although acknowledging that the Commission had previously held that "Act 82 does not materially alter the Commission's statutory obligations under HRS § 269-6(b)," Hu Honua contends that "the Commission has never made a determination whether it intends to apply [this amended version] to this remand proceeding[.]" ¹⁶ Arguing that "[s]uch determination will impact the evidence and witness testimony presented at the hearing as well as the post-hearing briefs[.]" Hu Honua seeks an explicit

¹⁴See Order No. 37910 at 26-32.

¹⁵Hu Honua Motion, Memorandum in Support at 1.

¹⁶Hu Honua Motion, Memorandum in Support at 1-2.

determination as to whether HRS § 269-6(b), as amended by Act 82, applies to this remanded proceeding.¹⁷

Further, in its Motion, Hu Honua again asserts its interpretation that Act 82 has amended HRS § 269-6(b) such that the Commission's consideration of GHG emissions is limited to GHG impacts associated with fossil fuels, and not other aspects (e.g., emissions associated with biomass) of the Project.¹⁸

On January 6, 2022, LOL filed a response which addressed, inter alia, Hu Honua's Motion, disagreeing with Hu Honua's interpretation of the Act 82 amendments.¹⁹

On January 10, 2022, Tawhiri filed a response to Hu Honua's Motion, in which Tawhiri argues that the Commission had already addressed the impact of Act 82 in Order No. 37910.²⁰ As a result Tawhiri contends that Hu Honua's Motion is, in fact,

¹⁷Hu Honua Motion, Memorandum in Support at 1.

¹⁸See Hu Honua Motion, Memorandum in Support at 7-8.

¹⁹See "Life of the Land's Motion for Leave; Memorandum in Support of Motion Objecting to Hu Honua Bioenergy LLC's (1) Motion to Continue Hearing, Memorandum in Support of Motion" [sic] Filed January 3, 2022, and (2) Motion to Confirm that Hawaii Revised Statutes Section 269-6(B), as Amended by Act 82, Applies to this Proceeding, Filed January 24, 2022; Verification; and Certificate of Service," filed January 6, 2022, Memorandum in Support at 4-5.

²⁰"Tawhiri Power LLC's Response to Hu Honua Bioenergy, LLC's Motion to Confirm that Hawaii Revised Statutes 269-6(b), as Amended by Act 82, Applies to this Proceeding; and Certificate of Service," filed January 10, 2022 ("Tawhiri Response"), at 1-2.

an untimely motion for reconsideration of Order No. 37910, and should be struck as such.²¹

On January 11, 2022, the Consumer Advocate filed a response to Hu Honua's Motion, in which it also recommended denying Hu Honua's Motion as an untimely motion for reconsideration of either Order No. 37852 or 37910.²² In addition, the Consumer Advocate argued that Hu Honua's Motion was barred by HAR § 16-601-141, which prohibits successive motions for reconsideration.²³

II.

DISCUSSION

The Commission observes that it has addressed the substance of Hu Honua's request in Order No. 37910, in that it has previously found that the changes to HRS § 269-6(b) as a result of Act 82 do not alter the Commission's statutory duties to examine the GHG emissions impacts of the Project, as a whole, versus the Commission being limited to examining impacts from only fossil fuels. Thus, the Commission agrees that Hu Honua's Motion could

²¹Tawhiri Response at 3.

²²"Division of Consumer Advocacy's Response to Hu Honua Bioenergy, LLC's Motion to Confirm that Hawaii Revised Statutes Section 269-6(b), as Amended by Act 82, Applies to this Proceeding," filed January 11, 2022 ("CA Response").

²³CA Response at 3.

be construed as an untimely motion for reconsideration of Order No. 37852 and/or Order No. 37910, as well as being prohibited by HAR § 16-601-141.

Notwithstanding the above, to the extent this was unclear in Order No. 37910, the Commission expressly clarifies that it will apply the version of HRS § 269-6(b) that is in effect; i.e., the version amended by Act 82.

With that clarification, the Commission does not see the need to further address the merits of Hu Honua's Motion. As noted above, Hu Honua's interpretation of the amendment to HRS § 269-6(b) as a result from Act 82 have already been addressed in Order Nos. 37852 and 37910; to wit, it does not materially affect the scope of HRS § 269-6(b) as applied to the Project, nor the applicability of HELCO I and HELCO II to this remanded proceeding.

III.

ORDERS

THE COMMISSION ORDERS:

1. Hu Honua's Motion is addressed as follows:

A. The Commission clarifies that it will apply the version of HRS § 269-6(b) that is currently in effect to this remanded proceeding.

B. In all other respects, Hu Honua's Motion is denied, to the extent it asserts arguments or seeks relief that has already been addressed by the Commission's prior orders.

DONE at Honolulu, Hawaii JANUARY 13, 2022.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By James P. Griffin
James P. Griffin, Chair

By Jennifer M. Potter
Jennifer M. Potter, Commissioner

By Leodoloff R. Asuncion, Jr.
Leodoloff R. Asuncion, Jr., Commissioner

APPROVED AS TO FORM:

Mark Kaetsu
Mark Kaetsu
Commission Counsel

2017-0122.ljk

CERTIFICATE OF SERVICE

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IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

HU HONUA BIOENERGY, LLC, a)	DOCKET NO. 2017-0122
Delaware Limited Liability Company,)	
)	In the Matter of the Application of
Appellant,)	
)	HAWAII ELECTRIC LIGHT COMPANY,
PUBLIC UTILITIES COMMISSION, State)	INC.
of Hawai‘i; HAWAII ELECTRIC LIGHT)	
COMPANY, INC., a domestic profit)	For Approval of a Power Purchase Agreement
corporation; DIVISION OF CONSUMER)	for Renewable Dispatchable Firm Energy and
ADVOCACY, Department of Commerce)	Capacity.
and Consumer Affairs; LIFE OF THE)	
LAND, a Hawai‘i non-profit corporation;)	APPEAL FROM THE PUBLIC UTILITIES
TAWHIRI POWER LLC, a domestic)	COMMISSION OF THE STATE OF
limited liability company; and HAMAKUA)	HAWAII [DOCKET NO. 2017-0122]
ENERGY, LLC, a domestic limited liability)	
company,)	
)	
Appellees.)	
)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was duly served as set forth below on the following parties on January 24, 2022:

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